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October 29, 2015

Via Email and U.S. Mail

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Re: A New Draft EIR/EIS is needed to be useable for federal decision making--BDCP/CWF RDEIR/SDEIS Comments

Dear Secretary Jewell, Secretary Pritzker, Administrator McCarthy, Secretary Laird, Director Cowin, Regional Director Murillo, and Federal and California Agencies, Officers, and Staff Members Carrying out and Reviewing the BDCP/CWF:

I. Summary

The purpose of the Delta Tunnels Project is not Federally authorized & does not comply with Federal & State law. Therefore, it remains unsuitable for Federal decision making.

Planning and Conservation League, Sierra Club, California Sportfishing Protection Alliance, Winnemem Wintu Tribe, Save the American River, the Southern California Watershed Alliance and the Environmental Water Caucus (EWC) (a coalition of over 30 nonprofit environmental and community organizations and California Indian Tribes) find the RDEIR/SDEIS fails to comply with federal law and fails to include tribal interests and fishing rights.

Federal law does not authorize the Central Valley Project to be operated for the narrow stated purpose of the project: *"Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts held by SWP contractors and certain members of San Luis Delta Mendota Water Authority, and other existing applicable agreements."*¹

The proposed project will take water from the Sacramento River before it reaches the Sacramento-San Joaquin River Estuary, for export and operations of the State Water Project (SWP) and federal Central Valley Project (CVP). Under federal law the coordinated operations of these projects are governed by the Coordinated Operations Act of 1986 (P.L. 99-546) and the Reclamation Act of 1937, as modified by the Central Valley Project Improvement Act (CVPIA) P.L 102-575 along with other laws and agreements. The proposed Delta Water Tunnels, requiring the construction of two 35-mile-long, 40-foot-wide tunnels, are designed to export more water South of the Delta estuary that current operations and will significantly harm Delta estuary water quality and beneficial uses, while boosting water quality and quantity to south of the Delta users. The purpose of the project ignores federal statutes governing these south of the Delta exports, such as the federally required provisions covered under the Coordinated Operating Agreement, the San Luis Project Act (P.L. 86-488), and the CVPIA and other federal statutes.² These provisions of federal law and associated regulations limit CVP exports from the Sacramento San Joaquin Delta Estuary and associated watersheds and require project yield to be reserved for fish and wildlife, tribal fishing rights and other environmental mitigation purposes.

¹ ACE 404 Permit Application & (73 Fed. Reg. 20326 (April 15, 2008)) first amended Notice of Intent

https://s3.amazonaws.com/californiawater/pdfs/5n2mg_Complete_Final_CA_Water_Fix_USACE_404_Permit_Application.pdf

²P.L. 86-488 authorizes CVP San Luis Unit water exports for only 500,000 acres to be irrigated in three counties: " ..five hundred thousand acres of land in Merced, Fresno, and Kings Counties, California, hereinafter referred to as the Federal San Luis unit service area.." Other statutes include: National Environmental Policy Act of 1969; Fish and Wildlife Coordination Act of 1958, Endangered Species Act of 1973, Clean Water Act of 1972 and the National Historic Preservation Act of 1960.

The Tunnel Project purpose of *"restore and protect the ability of the [State Water Project and Central Valley Project] to deliver up to full contract amounts"* to specified contractors is in conflict with these federal statutes, thus making the proposed NEPA compliance questionable and use for major federal actions unsuitable.³

II. Background

As noted by EPA⁴, the stated purpose of the Tunnel Project has confusing meaning. A significant increase in exports out of the Delta is inconsistent with state legislation and it hinders the scope of alternatives necessary for federal decision making. Full deliveries on contract amounts have never occurred. EPA states "Combined, the SWP and CVP full contract amounts for Delta exports are around 7,432,883 AF. As noted....historical exports by the CVP and SWP almost never exceed 6 MAF, so it appears that the "full contract amount" of exports is at least 1 million acre feet more *than has ever been exported historically*."

EPA states further⁵, "A significant increase in exports out of the Delta is inconsistent with recent state legislation. California Water Code Section 85021...states, in relevant part: "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation and water use efficiency. Federal Council on Environmental Quality regulations at 40 C.F.R. Section 1506.2(d) require that "[EISs] shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned.)" Further, under the Clean Water Act Section 404, the permit applicant must demonstrate that the chosen alternative is the "least environmentally damaging practicable alternative" (LEDPA) for meeting the overall project purpose pursuant to the CWA Section 404 (b) (I) Guidelines. In accordance with Army Corps of Engineers Standard Operating Procedures Regulatory Program, p 7, "The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives."

EPA, citing the California Supreme Court, states clearly that significantly increasing exports out of a stressed Delta is the wrong policy. The California Supreme Court, when it evaluated appeals of the CALFED Bay Delta Program, noted that the Program was an experiment:

"The CALFED Program is premised on the theory, **as yet unproven**, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced." In the Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings, 43Cal.4th. 1143 (2008)(emphasis added). Note that the Court was looking at a program that was developed during the 1990's. and adopted in 2000. The intervening ten years have not proved the theory accurate, and, in fact. seem to point the other way."⁶

³ Deference to action agencies is not unlimited. See, for example, *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666 (7th Cir. 1997) (Rejecting "single source" definition of project purpose for water supply, noting that "[i]f the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role."). See also *Border Power Plant Working Group v. DOE*, 260 F. Supp. 3d 997 (S.D. Cal., 2003)(Rejecting and broadening agency's definition of project purpose.); Similarly, *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002).

⁴ EPA, Straus & Manzanilla, June 2010 letter to Glaser, Lohefener and McInnis Re "Purpose Statement for Bay Delta Conservation Plan (BDCP)

⁵ Ibid.

⁶ **Ibid** pg 5.

Congress limits CVP water exports, requires reservoir releases, and authorizes diversions sufficient to provide water to meet obligations to control salinity, protect water quality, and restore refuges. These requirements, along with the 800,000 acre feet of CVP water yield reserved to restore fish and aquatic habitat needs, are not clearly provided in the legal baseline for the project. Further, the proposed project purpose conflicts with federal CVP operational constraints laid out in federal statute and agreements. A review of the BDCP/CWF RDEIR/SDEIS (Delta Water Tunnels) documents finds a failure to disclose how the project purpose will comply with the federal statute and regulations that require mitigation for the environmental effects of the CVP along with the proposed additional exports from Delta Tunnels project, which seek to remove nearly ten million acre-feet of water from the watersheds of origin. The impacts of CVP exports from these watersheds have been significant. Current federal statute and regulation require water yield for these specific purposes. Water exports from north of the Sacramento River Delta to south of the Delta reduce the flow of water in the Sacramento River and its tributaries, with damaging effects on a large riparian ecosystem.⁷ These statutory requirements for mitigation of these impacts include but are not limited to these provisions:

1. Water quality and flow standards (D-1641) imposed on CVP and SWP water rights
2. Sacramento River Temperature Control Operations
3. Fish and Wildlife and area of Origin Trinity River Minimum Release Requirement Increases
4. Sacramento River Winter-Run Chinook Salmon ESA Listing
5. CVPIA 3406(b)(2) and Refuge Water Supplies⁸
6. Delta Smelt ESA Listing
7. San Joaquin flow standards
8. Sacramento River Spring-Run Chinook Salmon ESA Listing,
9. Steelhead Trout ESA Listing
10. Doubling of anadromous fish.

⁷ CVPIA Section 3406(b) requires the Secretary to meet all obligations under the Endangered Species Act, 16 U.S.C. § 1531-1544, and all decisions of the California State Water Resources Control Board. In addition, § 3406(b)(1) requires by October, 1995, implementation of a plan to restore anadromous fish populations on all Central Valley rivers except the San Joaquin River at twice the average levels between 1967 and 1991. In addition § 3406(b) establishes specific guidelines for implementing and reviewing this plan. Section 3406(c) relates to restoration of the San Joaquin River. Section 3406(d) relates to rehabilitation of wetland wildlife habitats. An anadromous fish is one that hatches in a river, migrates to the 'ocean for maturity, then returns upriver to spawn. The primary anadromous fish in California are salmon, steelhead, striped bass, sturgeon, and American shad. See C.V.P. Improvement Act § 3403(a).

⁸ Refuges within or near the Delta include:

- Stone Lakes National Wildlife Refuge
- Antioch Dunes National Wildlife Refuge
- Sacramento National Wildlife Refuge
- Delevan National Wildlife Refuge
- Colusa National Wildlife Refuge
- Sacramento River National Wildlife Refuge
- San Joaquin River National Wildlife Refuge

Refuges in or near San Francisco Bay and nearby coastal ocean include:

- San Pablo Bay National Wildlife Refuge
- Marin Island National Wildlife Refuge
- Don Edwards San Francisco Bay National Wildlife Refuge
- Farallon National Wildlife Refuge

Pursuant to CVPIA, refuge water is provided to National Wildlife Refuges South of the Delta

III. Compliance with the Central Valley Project Improvement Act requires a fundamental change in the proposed project purposes for the BDCP/CWF RDEIR/SDEIS to be useable by federal agencies and to comply with the "Least-Cost CVP Yield Increase Plan":

Central Valley Project. Section 2 of the 1937 Act was amended by the 1992 amendment as follows (italics show changes):

[T]he entire Central Valley Project . . . is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, ... for the reclamation of arid and semiarid lands and the lands of Indian reservations, *and mitigation, protection, and restoration of fish and wildlife*, and other beneficial uses.... And provided further, That the said dam and reservoirs shall be used, first for river regulation, improvement of navigation, and flood control; second, for irrigation and *domestic uses and fish and wildlife mitigation, protection, and restoration purposes*; and, third, for *power and fish and wildlife enhancement*. *The mitigation for fish and wildlife losses incurred as a result of construction, operation, or maintenance of the Central Valley Project shall be based on the replacement of ecologically equivalent habitat and shall take place in accordance with the provisions of this title and concurrent with any future actions which adversely affect fish and wildlife populations or their habitat but shall have no priority over them.*

Under the Act, new short-term, temporary, or long-term contracts are prohibited until the following events have occurred:

1. Fish and wildlife activities specified in section 3406(b)-(d) are carried out, including, among other activities, doubling the anadromous fish population in Central Valley rivers and streams, commencement of rehabilitation of the San Joaquin River, and commencement of waterfowl habitat restoration.
2. Completion by the California Water Resources Control Board of its review of Delta water quality standards required by *United States v. State Water Resources Control Board* (182 Cal.App.3d 82 (1986 See below), and the EPA approves the Board's decision.
3. 120 days elapse after the Secretary of the Interior reports to relevant Congressional committees on how the CVP will meet its Bay Delta obligations to preserve water quality.

These required events have not been completed. Furthermore, contracts to pay for the proposed project are needed prior to construction and have not been forthcoming.⁹ Before a project alternative can be determined as feasible, cost sharing and the feasibility of payment is needed. Extensive negotiations with State Contractors remain unresolved.¹⁰ How the proposed project and each alternative will impact these federal requirements is

⁹ Water Code §85089. Construction of a new Delta conveyance facility shall not be initiated until the persons or entities that contract to receive water from the State Water Project and the federal Central Valley Project or a joint powers authority representing those entities have made arrangements or entered into contracts to pay for both of the following: (a) The costs of the environmental review, planning, design, construction, and mitigation, including mitigation required pursuant to Division 13 (commencing with Section 21000 of the Public Resources Code), required for the construction, operation, and maintenance of any new Delta water conveyance facility. (b) Full mitigation of property tax or assessments levied by local governments or special districts for land used in the construction, location, mitigation, or operation of new Delta conveyance facilities.

¹⁰ Extensive comments have been provided by PCL et. al. to identify existing costs to SWP contractors and resultant needs to raise revenues and issue debt. See comments regarding the State Water Project Contract extension and http://www.c-win.org/webfm_send/421

not disclosed in the REIR/SEIS. Needed comparisons for each alternative to the No Action alternative are vague summaries that are inadequately specified. Also, many of the scenarios of the Preferred Alternative “range” decrease Delta outflow despite the fact that several key scientific evaluations by federal and State agencies indicate that more outflow is necessary to protect aquatic resources and fish populations.¹¹ In addition, recent technical reports and emerging research raise questions about whether the proposed mitigation of tidal marsh is feasible¹², possible¹³, or effective¹⁴. These are scientific questions about the assumptions used to support restoration proposals and projections of anticipated benefits to fish populations, while the costs to the environment and obligations by contractors to meet required environmental project yields remain vague and unclear. Without this information an informed decision cannot be made.

IV. Compliance with Federal Principles and Guidelines Requiring Comparison of Costs and Benefits is Absent.

Army Corps of Engineers and the Bureau of Reclamation require that new or existing Federal investments to construct new infrastructure, modify or replace existing infrastructure, or implement major changes to the operations of Federal assets comply with the Principles and Requirements for Federal Investments in Water Resources dated March 2013 and 1983. These requirements, along with Reclamation Manual Directives and Standards CMP09-02, require a clear distribution of all financial costs of a project among its authorized purposes. This is necessary to determine whether the project beneficiaries are capable of repaying the reimbursable costs assigned to them. The allocation provides the basis for establishing the repayment obligations specified in water-related contracts. Further P.L. 99-546 requires full CVP repayment and pay-off by Central Valley Contractors by 2030. The proposed project has been estimated in 2012 dollars to nominally cost more than \$16 billion dollars, but ultimately cost some \$67 billion with financing and operation and maintenance costs according to figures provided to the Westlands Water District Board.¹⁵ Interior's Inspector General's audit indicates that, under current water rates, Contractors will likely fail to meet the repayment

¹¹ [7] State Water Resources Control Board's, 2010 Flows Report, p.2.

"Interior remains concerned that the San Joaquin Basin salmonid populations continue to decline and believes that flow increases are needed to improve salmonid survival and habitat." USFWS May 23, 2011 Phase I Scoping Comments, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/cmrnt052311/amy_aufdemberge.pdf

"Inadequate flow to support fish and their habitats is directly and indirectly linked to many stressors in the San Joaquin river basin and is a primary threat to steelhead and salmon." NMFS February 4, 2011 Phase I Scoping Comments, available at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/cmrnt020811/010411dpowell.pdf

"...current Delta water flows for environmental resources are not adequate to maintain, recover, or restore the functions and processes that support native Delta fish." Executive Summary in 2010 CDFG Flow Criteria.

"a strong majority of scientists prioritizes habitat and flow management actions that would restore more natural processes within and upstream of the delta" (p. 2) http://www.ppic.org/content/pubs/report/R_413EHR.pdf

¹² NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document (04/4/2013), page 15.

¹³ U.S. Fish and Wildlife Service Staff BDCP. The broad concern is that the tidal prism would be diminished over time by the large increases in tidal habitat.

¹⁴ Lucas, L. V., and J. K. Thompson. 2012. Changing restoration rules: Exotic bivalves interact with residence time and depth to control phytoplankton productivity. *Ecosphere* 3(12):117. <http://www.esajournals.org/doi/pdf/10.1890/ES1200251.1>. The issue raised is whether the increased production of plankton by the restored wetlands would be offset by the increased consumption by exotic bivalves as they spread into the restored wetlands..

¹⁵ http://www.mercurynews.com/ci_24795356/deltatunnels-plans-true-price-tag-much-67

deadline for **just existing CVP costs.**¹⁶ How these additional costs will be repaid with construction spanning over a decade is not disclosed, and, thus, ratepayers, taxpayers and decision makers are left in the dark. The REIR/SEIS provides no such information on how these financial costs will be allocated. Nor is information provided as to how the project meets the "Least-Cost CVP Yield Increase Plan" pursuant to Title 34 P.L. 102-575 Section 3408(j).

In accordance with federal regulatory requirements¹⁷, the following information is required for projects, studies, and/ or any projects with federal funding assistance, such as the proposed Delta Water Tunnels, in order to legally implement Executive Order 12322 Water Resources Projects and Principles, Requirements and Guidelines for Water and Land Related Resources Implementation Studies:

- (1) how well the planning objectives are met;
- (2) the economic justification;
- (3) the validity of the scientific, technical, and design assumptions;
- (4) the ability to construct a project, implement a non-structural plan, or both, according to Reclamation standards and practices, within the estimated cost and schedule;
- (5) the reliability of the estimated costs and benefits;
- (6) the reliability of the proposed construction schedule; and
- (7) the capability and willingness of the project partner(s) to financially support the project

V. Insufficient Information Is Provided to Ensure NEPA Compliance To Determine the Least Environmentally Damaging Practicable Alternative Required Under the Clean Water Act.

On July 16, 2014, the U.S. Army Corps of Engineers found that: “the EIS/EIR is not sufficient at this time in meeting the Corps’ needs under the National Environmental Policy Act (NEPA) . . . in particular with regard to the incomplete description of the proposed actions, alternatives analysis . . . and impacts to waters of the United States and navigable waters, as well as the avoidance and minimization of, and compensatory mitigation for, impacts to waters of the United States.” (Letter p. 1). Additional Corps comments include the absence in the EIR/EIS of “an acceptable alternatives analysis” (comment 4); no demonstration of which alternative may contain the Least Environmentally Damaging Practicable Alternative (LEDPA) for section 404, Clean Water Act purposes (Comment 5); “the document needs a clear explanation of a reasonable range of alternatives and a comparison of such, including a concise description of the environmental consequences of each” (comment 19); and, “new conveyance was not a part of the preferred alternative for CalFed. Does this EIS/EIR describe why the reasons for rejecting new conveyance in CalFed are no longer valid?” (Comment 22).

The current REIR/SEIS does not remedy these fatal flaws. Furthermore, the undersigned attempted through a FOIA request to obtain specific information provided to the Army Corps by the project applicants, but the request for this information between two public agencies was denied.¹⁸ Thus, the following information necessary to comply with federal statute remains hidden from the public and the piece-meal approach to providing such fundamental project information leaves the public and decision makers in the dark regarding the

¹⁶ <https://www.doi.gov/sites/doi.gov/files/WR-EV-BOR-0003-2012Public.pdf>

¹⁷ <http://www.usbr.gov/recman/cmp/cmp09-02.pdf>

¹⁸ September 30, 2015, see correspondence A. L. Faustino District Counsel to Patricia Schifferle regarding Freedom of Information Act Request FA-15-0201 (Documents and Comments Related to BDCP_DHCCP, DCE or Cal Fix for the Water Tunnels Diversion Project).

full impacts from the proposed project and the alternatives. The identified deficiencies include but are not limited to:

1. A detailed hydraulic study per Corps' standards for Section 408 NEPA
2. A detailed level of engineering design, as well as a detailed level of analysis related to effects to the Corp's civil works projects and indirect hydraulic effects.

Applying for permits prior to an approved project for a pre-determined project outcome clearly indicates bias on the part of the lead agency to a pre-determined outcome. A 408 authorization and NEPA compliance is needed and in turn must be approved under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act, but this is not possible until the 408 authorization is obtained. The Central Valley Project is operated as a whole. The public and decision makers need the complete environmental impact picture prior to any decision regarding the LEDPA alternative.

On August 26, 2014, the U.S. Environmental Protection Agency (EPA) issued its 40-page review of the Draft BDCP EIS finding in BDCP's case that:

"Operating any of the proposed conveyance facilities . . . would contribute to increased and persistent violations of water quality standards in the Delta, set under the Clean Water Act, measured by electrical conductivity (EC) and chloride concentrations. We recommend that the Supplemental Draft EIS include one or more alternatives that would, instead, facilitate attainment of all water quality standards in the Delta. Specifically, we recommend that an alternative be developed that would, at minimum, not contribute to an increase in the magnitude or frequency of exceedances of water quality objectives, and that would address the need for water availability and greater freshwater flow through the Delta. Such an alternative should result in a decrease in the state and federal water projects' contributions to the exceedance of any water quality objectives in the Delta. (*Id.*, p.2).

EPA further stated that "Data and other information provided in the Draft EIS indicate that all CM1 [Tunnels Project] alternatives may contribute to declining populations of Delta smelt, Longfin smelt, green sturgeon, and winter-run, spring-run, fall-run and late-fall run Chinook salmon." (p. 10). "We recommend that the Supplemental Draft EIS consider measures to insure freshwater flow that can meet the needs of those [declining fish] populations and ecosystem as a whole, and is supported by the best available science. We recommend that this analysis recognize the demonstrated significant correlations between freshwater flow and fish species abundance." (*Id.*). "Other reasonable alternatives could be developed by incorporating a suite of measures, including Integrated Water Management, water conservation, levee maintenance, and decreased reliance on the Delta." (*Id.* p. 3). In addition, EPA concluded that "The Draft EIS does not address how changes in the Delta can affect resources in downstream waters, such as San Francisco Bay, and require changes in upstream operations, which may result in indirect environmental impacts that must also be evaluated. We recommend that the Supplemental Draft EIS include an analysis of upstream and downstream impacts." (*Id.*).

In FOIA documents provided by the National Marine and Fishery Service, it is apparent that similar warnings to the project applicants regarding impacts to critical habitat, endangered species and required temperatures have been ignored in the REIR/SEIS, leaving mitigation measures and compliance with existing ESA Reasonable and Prudent Alternative up to some future date.¹⁹

VI. Conclusion

¹⁹ See DOC-NOAA-2015-001768 to Patricia Schifferle found at:
<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2808890c5>

The singular purpose of the Tunnels Project to export Sacramento River water before it reaches the Sacramento-San Joaquin River Delta and San Francisco Bay is a fundamental flaw that renders the NEPA documents by federal agencies unusable because the documents do not comply with federal statutes and regulations.

Our organizations have already communicated several times over the years with BDCP officials about the failure to develop a range of reasonable alternatives in the BDCP process.²⁰ Instead of complying with the Delta Reform Act, the ESA, the Clean Water Act, and applying the public trust doctrine, all of the so-called Delta Water Tunnels alternatives involve taking freshwater water essential to the health and beneficial uses of the Sacramento-San Joaquin Estuary and San Francisco Bay before the water reaches the estuary. Taking this essential water and adding additional fish-grinding pumps on the Sacramento River (in addition to the southern Delta pumps which will still operate) , while exacerbating fish kills, damaging flows, and degrading temperatures, water quality, and water supply to over 5 million people residing in surrounding municipalities and water dependent industries, is not authorized under the Central Valley Project.

The narrow purpose of the Tunnels Project to promote the delivery of imaginary 'paper water' to south of the Delta contractors first, above all other users, also will have significant financial impacts that have not been disclosed. Under NEPA Regulations, "This [alternatives] section is the heart of the environmental impact statement." The alternatives section should "sharply" define the issues and provide a clear basis for choice among options by the decision-maker and the public. 40 C.F.R. § 1502.14. Moreover, if "a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action." § 1502.9(a). The Responsible Exports Plan and variants on it must be among those alternatives in a new Draft EIR/EIS for BDCP that helps to disclose, sharpen and clarify the issues.²¹

Reclamation and DWR have failed to produce an alternatives section that "sharply" defines the issues and provides a clear basis for choice among options as required by the NEPA Regulations, 40 C.F.R. § 1502.14. Again, those issues must include producing more Delta inflow and outflow through the estuary as habitat for listed fish species, and documenting the impacts on Delta ecosystems as called for in Water Code § 85021. The choice presented must include increasing flows by reducing exports, not just reducing flows by increasing the capacity for exports as is called for by *all* of the so-called "alternatives" presented in the BDCP Draft Plan, Draft EIR/EIS, and RDEIR/SDEIS.²²

²⁰ This letter follows previous comments from the undersigned groups including Friends of the River comment letter of May 21, 2014, joint May 28, 2014 and joint September 4, 2014 comment letters focused on the failure of the BDCP Draft plan and Draft EIR/EIS to identify and evaluate a range of reasonable alternatives that are the declared "heart" of both the NEPA and CEQA required EISs and EIRs. A detailed evaluation of the Draft EIR/EIS's inadequate alternatives analysis was provided by the EWC in its comment letter of June 11, 2014, accessible online at <http://ewccalifornia.org/reports/bdcpcomments6-11-2014-3.pdf>.

²¹ The EIS alternatives section is to "Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." § 1502.14(a).

²² In *California v. Block*, 690 F.2 753, 765-769 (9th Cir. 1982), the project at issue involved allocating to wilderness, non-wilderness or future planning, remaining roadless areas in national forests throughout the United States. The court held that the EIS failed to pass muster under NEPA because of failure to consider the alternative of increasing timber production on federally owned lands currently open to development; and also because of failure to allocate to wilderness a share of the subject acreage "at an intermediate percentage between 34% and 100%." 690 F.2d at 766. Like the situation here where the BDCP agencies claim a trade-off involved between water exports and Delta restoration (RDEIR/SDEIS ES 4-6), the Forest Service program involved "a trade-off between wilderness use and development. This trade-off however, cannot be intelligently made without examining whether it can be softened or eliminated by increasing resource extraction and use from already developed areas." 690 F.2d at 767. Here, likewise, trade-offs cannot be

In short, the fundamental flaws in the alternatives sections in the BDCP Draft EIR/EIS, Chapter 9 of the BDCP plan, and the RDEIR/SDEIS, have led to NEPA and CEQA documents “so fundamentally and basically inadequate and of a summary nature that meaningful public review and comment were precluded.”40 C.F.R. § 1502.9(a).

Least cost alternatives presented in EWC’s Plan have been completely ignored so far by Reclamation and DWR. These alternatives fit into Congressional directives under the Central Valley Project Improvement Act to follow the "Least-Cost CVP Yield Increase Plan." Additionally these alternatives save ratepayer and taxpayers money while fitting the EPA’s and the SWRCB’s calls for alternatives that would increase freshwater flow through the Delta, as well as the Army Corps’ call for an acceptable alternatives analysis. It is time to include increasing freshwater flows through the Delta by reducing exports among the range of reasonable alternatives required by law, and presented to the public for comment.. Consideration of this alternative approach is imperative. Extinction of species is forever.

Should you have any questions, please contact Conner Everts, Co-Facilitator, Environmental Water Caucus at (310) 394-6162 ext. 111 or Jonas Minton Planning and Conservation Leagues at (916) 719-4049.

Sincerely,

Sincerely,

/s/ Conner Everts
Co-Facilitator
Environmental Water Caucus

/s/ Jonas Minton
Senior Water Policy Advisor
Planning and Conservation League .

/s/ Kathryn Phillips
Director
Sierra Club California

/s/ Bill Jennings
Executive Director
California Sportfishing Protection Alliance

/s/ Chief Caleen Sisk
Spiritual Leader
Winnemen Wintu Tribe

/s/ Stephen Green
President
Save the American River Association

Additional Addressees, all via email:

Maria Rea, Assistant Regional Administrator
National Marine Fisheries Service

intelligently analyzed without examining whether the impacts of alternatives reducing exports can be softened or eliminated by increasing water conservation, recycling, and eventually retiring drainage-impaired agricultural lands in the areas of the exporters from production. *Accord, Oregon Natural Desert Assn. v. Bureau of Land Management*, 625 F.3d 1092, 1122-1124 (9th Cir. 2010) (EIS uncritical alternatives analysis privileging of one form of use over another violated NEPA). Here, the BDCP alternatives analysis has unlawfully privileged water exports over protection of Delta water quality, water quantity, public trust values, and ESA values.

Michael Tucker, Fishery Biologist
National Marine Fisheries Service

Larry Rabin, Acting, Field Supervisor, S.F. Bay-Delta
U.S. Fish and Wildlife Service

Lori Rinek
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